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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 174

ALFRED TERRELL,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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July 5, 1950.

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OCTOBER TERM, 1949

No.

ALFRED TERRELL,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alfred Terrell, petitioner in the courts below, respectfully prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court, entered February 6, 1950, affirming a decision by the Tax Court of the United States, entered August 27, 1948, which decision held that there was a deficiency in the petitioner's income tax for the calendar year 1943 in the amount of $11,881.72.

SUMMARY STATEMENT OF MATTER INVOLVED

Summary of the Facts

The facts, to a large extent stipulated, are not in dispute. The petitioner resides in Chicago, Illinois (R. 49).* He filed his Federal income tax returns for the periods here involved with the Collector of Internal Revenue for the First District of Illinois at Chicago (R. 49). The taxes in controversy are the petitioner's Federal income and victory taxes for the years ended December 31, 1942** and December 31, 1943 (R. 9, 49).

On November 9, 1926, the petitioner, then residing in New York City, entered into a separation agreement with his wife, Ethel H. Terrell, then residing in Pleasantville, New York, whom he married in 1900 (R. 49; Exhibit B, annexed to Stipulation of Facts, R. 51-59). Pursuant to this agreement, the petitioner agreed to live separately and apart from his wife and to pay her certain sums for her alimony and for the support and maintenance of herself and their two minor sons (R. 51-59).

Subsequently the petitioner defaulted in making payments under the aforesaid agreement (R. 50). Pursuant to a provision of the agreement (R. 59), the petitioner's wife instituted two actions against him in the Supreme Court of the State of New York, County of New York, to recover payments due under the agreement (1) for the years 1927 and 1930-1936, and (2) for the year 1937 (R. 50).

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*All citations to the printed transcript of the Record are to the page numbers thereof, unless otherwise stated.

**The petitioner's Federal income tax paid for the year 1942 is pertinent because of the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, 26 U. S. C. A. § 6(f), I. R. C. § 1622 note (R. 11).

In the first of these actions, an order was entered (McCook, J.) on May 16, 1939 directing the petitioner to pay to his wife the sum of $500 per month (R. 50; Exhibit C, annexed to Stipulation of Facts, R. 60-61). This order was pursuant to a judgment entered against the petitioner in the Office of the Clerk of the County of New York on January 12, 1949 in the sum of $8,035.23 in favor of the petitioner's wife (Petitioner's Exhibit 3, R. 77).

In the other action, an order was entered (Dineen, J.) on June 24, 1941 directing the petitioner to pay to his wife the sum of $1,000 per month (R. 50; Exhibit D, annexed to Stipulation of Facts, R. 62-63). This order was pursuant to a judgment entered against the petitioner in the Office of the Clerk of the County of New York on March 29, 1941 in the sum of $15,974.20 in favor of the petitioner's wife (Petitioner's Exhibit 4, R. 78-79). This judgment was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 46-47; *Terrell* v. *Terrell*, 263 App. Div. 948, 34 N. Y. S. (2d) 144 (1st Dept. 1942)). Thereafter a motion by the appellant for leave to appeal to the Court of Appeals was denied by the Appellate Division (34 N. Y. S. (2d) 833) and by the Court of Appeals (288 N. Y. 740, 42 N. E. (2d) 751 (1942)).

The petitioner paid to his wife or to her attorneys for her account the sum of $1,000 per month during each of the years 1942 and 1943 (R. 34-35; Petitioner's Exhibit 1, R. 65-76). These payments were made pursuant to and because of the order of June 24, 1941 and the judgment of March 29, 1941, as affirmed by the Appellate Division, First Department (R. 33).

The Commissioner of Internal Revenue disallowed as deductions the petitioner's alimony or separate maintenance payments of $12,000 for each of the years 1942 and 1943 on the ground that they were not allowable deductions under the provisions of Section 23(u) of the Internal Revenue Code and assessed a deficiency of income and victory tax in the sum of $11,881.72 for the year 1943* against the petitioner (R. 8-12). In order to obtain a redetermination of this deficiency assessment, the petitioner instituted this proceeding in the Tax Court below (R. 3-7).

Question Passed on by Lower Courts

The question passed on by the Tax Court and by the Court of Appeals was whether the alimony or separate maintenance payments of $12,000 for each of the years 1942 and 1943 which were made by the petitioner to his wife from whom he was legally separated were payments which should be includible in the gross income of the wife under I. R. C. § 22(k) and therefore deductible from the gross income of the petitioner under I. R. C. § 23(u).

Decision by Tax Court

The Tax Court (Opper, J.) held "After careful consideration of the contentions persuasively advanced in petitioner's behalf" that it was nevertheless "driven to conclude" that a deficiency in the amount of $11,881.72 in the petitioner's income tax for the year 1943 as found by the Commissioner of Internal Revenue did exist (R. 82; reported at 7 T. C. M. 615 [C. C. H. Dec. 16, 570 (M)]).

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*The Commissioner's failure to make a deficiency assessment for the year 1942 is due to the Current Tax Payment Act, *supra*, p. 2n.

Decision by Court of Appeals

The Court of Appeals in an opinion by Finnegan, C. J., affirmed the decision of the Tax Court (R. 101-108; reported at 179 F. (2d) 838).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered February 6, 1950 (R. 108). On May 2, 1950, an order was entered by Hon. Sherman Minton, Associate Justice of this Court, extending to July 5, 1950, the time of the petitioner for filing his petition for certiorari. The within petition for certiorari was filed July 5, 1950.

QUESTION PRESENTED

The sole question passed upon by the lower courts and presented for determination by this Court is:

> Were the alimony or separate maintenance payments made by the petitioner to his wife during the years 1942 and 1943 includible in the gross income of his wife under I. R. C. § 22(k) and therefore deductible from his gross income under I. R. C. § 23(u)? The determination of this question requires consideration of the subordinate questions whether the payments made by the petitioner to his wife during the tax years involved were payments made to her while she was "legally separated" from

the petitioner and whether the payments were made "in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree *or under a written instrument incident to such* divorce or *separation* . . ." (I. R. C. § 22(k); italics added).

[*The Tax Court held that the payments made by the petitioner to his wife during the years 1942 and 1943 were not includible in the gross income of the wife under I. R. C. § 22(k) and therefore were not deductible from the gross income of the petitioner under I. R. C. § 23(u) (R. 80-83), and the Court of Appeals affirmed (R. 101-107).*]

REASONS FOR ALLOWANCE OF THE WRIT

1. ***The Decision by the Court of Appeals Below is Believed to Have Decided an Important Question under the Revenue Laws Which Has Not Been, But Should Be, Settled by This Court.***

This case presents for determination, upon facts characterized by the Tax Court as novel in their combination (R. 82), a question of interpretation arising under I. R. C. § 22(k) and I. R. C. § 23(u), namely, whether alimony payments made by a husband to his wife from whom he was legally separated, such payments having been made pursuant to orders and judgments of a Court of competent jurisdiction, are includible in the gross income of the wife under I. R. C. § 22(k) and therefore deductible from the gross income of the husband under I. R. C. § 23(u). This question of interpretation arising under the revenue laws has not been, but should be, settled by this Court.

It is particularly important that this question should be settled by this Court at this time in the interest of a uniform application of I. R. C. §§ 22(k) and 23(u) throughout the United States in accordance with the Constitution of the United States, Article I, Section 8, Clause 1. Judge Clark stated in the last paragraph of his opinion in *Smith* v. *Commissioner*, 168 F. (2d) 446, 448-449 (C. C. A. 2d, 1948), that "There is no reason, for example, why a separation agreement should have one effect, taxwise, in New York and another in Connecticut." The decision by the Court of Appeals below in the instant case results in precisely the lack of uniformity in the administration of the revenue laws which Judge Clark in the *Smith* case declared against; for in New York a husband separated from his wife under a valid separation agreement cannot obtain a judicial decree of separation, whereas his neighbor in Connecticut can obtain a decree of divorce or separate maintenance embodying the provisions of the separation agreement and thereby can obtain a deduction under I. R. C. § 23(u) which has been denied to the New York husband under the decision in the instant case.

This inequality in the application of the revenue laws in the instant case arises out of the peculiar law of the State of New York where, once the parties are separated pursuant to a valid subsisting separation agreement, neither party can obtain a judicial decree of separation, since the separation agreement constitutes a complete defense to an action for separation.

New York Civil Practice Act, §§ 1161-1165;
Johnson v. *Johnson*, 206 N. Y. 561, 100 N. E. 408 (1912);

Stoddard v. *Stoddard,* 227 N. Y. 13, 124 N. E. 91 (1919);

Powers v. *Powers,* 33 App. Div. 126, 53 N. Y. Supp. 346 (1st Dept. 1898);

Benesch v. *Benesch,* 182 App. Div. 221, 169 N. Y. Supp. 561 (1st Dept. 1918);

Drane v. *Drane,* 207 App. Div. 217, 201 N. Y. Supp. 756 (1st Dept. 1923);

Oatman v. *Oatman,* 267 App. Div. 805, 46 N. Y. Supp. (2d) 269 (4th Dept. 1943);

Polakoff v. *Polakoff,* 175 Misc. 354, 23 N. Y. Supp. (2d) 259 (1940);

Weimar v. *Weimar,* 25 N. Y. Supp. (2d) 343 (1940);

Carmody's New York Practice, Vol. 9, § 238 and authorities cited therein.

Under the law of New York, therefore, the petitioner is "legally separated" from his wife by virtue of the separation agreement of November 9, 1926, which constitutes the highest degree of judicial recognition obtainable in that State of the status of legal separation in view of the subsistence of a valid separation agreement.

Under the provisions of I. R. C. § 22(k), since the payments in question were made by the petitioner to his wife from whom he was "legally separated," they therefore were made "* * * in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under * * * a written instrument incident to such * * * separation * * *". Significantly I. R. C. § 22(k) does not expressly require the pay-

ments to have been made pursuant to "a written instrument incident to such * * * separation *decree.*"

Under these circumstances, we submit, in the interest of the uniform application of I. R. C. §§ 22(k) and 23(u) of the Internal Revenue Code, the petitioner's claim for deduction of the payments made by him to his wife during the years 1942 and 1943 should be sustained. Any other holding would result in a discrimination against the petitioner which certainly was not intended by Congress when it enacted I. R. C. §§ 22(k) and 23(u).*

2. ***The Decision by the Court of Appeals Below is Believed to be in Conflict with the Position of the Court of Appeals for the Second Circuit Upon the Same Question.***

The crux of the decision by the Court of Appeals below lies in its construction of the clause "a written instrument incident to such divorce or separation" as set forth in I. R. C. § 22(k).

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*H. R. 7738 pending in the Second Session of the 81st Congress contains a proposed amendment to I. R. C. § 22(k) which appears to give effect to the intent of Congress upon this precise point:

> "(k) ALIMONY, ETC., INCOME.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, *or who is separated from her husband pursuant to a written separation agreement*, periodic payments (whether or not made at regular intervals) received subsequent to such decree *or to the* effective date of the written separation agreement in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by (a) *such* husband under (a) *such* decree (of divorce or of separate maintenance) or under a written instrument incident to such divorce or separation *or under the written separation agreement*, shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband." (Italicized words indicate proposed changes.)

With respect to this clause. the Court of Appeals below stated (R. 107; 179 F. (2d) 838, 842):

> "* * * there must be a decree of divorce or separation and the obligation of payment by the taxpayer must be imposed under that decree or under a written instrument incident to the decree of divorce or separation. In the case at bar there is no such decree."

With respect to the same clause of I. R. C. § 22(k), Judge Learned Hand, in an opinion concurred in by Judge Swan and Judge Augustus N. Hand, in the case of *Commissioner* v. *Murray*, 174 F. (2d) 816, 817 (C. C. A. 2d, 1949), stated:

> "As a new question we are not prepared to say that the phrase, 'a written instrument incident to such divorce or separation,' should be read as 'incident to such divorce or separation decree' ".

This statement in an opinion joined in by the three senior judges of the Court of Appeals for the Second Circuit on May 20, 1949 must be regarded as significant in overruling in effect the previous holding by the same court on June 2, 1948 in the case of *Smith* v. *Commissioner*, 168 F. (2d) 446, 447 (C. C. A. 2d, 1948).

The Court of Appeals below rested its decision upon the case of *Smith* v. *Commissioner, supra* (R. 104-106; 179 F. (2d) 838, 840-841), and therefore, we submit, is in conflict with the decision by the Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Murray, supra.*

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Seventh Circuit and that the duly certified transcript of the proceedings below which accompanies this petition shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that your petitioner may be granted such other, further and different relief as this Court may deem proper.

Dated: Stamford, Connecticut, July 5, 1950.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Tax Court (R. 80-83) is reported at 7 T. C. M. 615. The opinion of the Court of Appeals for the Seventh Circuit (R. 100-107) is reported at 179 F. (2d) 838.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered February 6,

1950 (R. 108). On May 2, 1950, an order was entered by Hon. Sherman Minton, Associate Justice of this Court, extending to July 5, 1950, the time of the petitioner for filing his petition for certiorari. The within petition for certiorari was filed July 5, 1950.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the petition at pages 2-4, *supra*. A summary of the argument is set forth in the index.

STATUTES INVOLVED

The following statutory provisions, in relevant part, are involved herein.

INTERNAL REVENUE CODE, § 22(k):

> "Section 22. Gross income
>
> * * *
>
> "(k) Alimony, etc., income. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *"

INTERNAL REVENUE CODE, § 23(u):

> "Section 23. Deductions from gross income. In computing net income there shall be allowed as deductions:
>
> * * *
>
> "(u) Alimony, etc., payments. In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection."

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals for the Seventh Circuit erred

1. In declining to hold that under the law of New York the petitioner is "legally separated" from his wife by virtue of the separation agreement of November 9, 1926.

2. In declining to hold that under the law of New York once the parties are separated pursuant to a valid subsisting separation agreement, neither party can obtain a judicial decree of separation, since the separation agreement constitutes the highest degree of judicial recognition obtainable in that State of the status of legal separation and the separation agreement constitutes a complete defense to an action for separation.

3. In declining to hold that the payments made by the petitioner to his wife from whom he was "legally separated" were made "* * * in discharge of * * * a legal obligation

which, because of the marital or family relationship, is imposed upon or incurred by such husband under * * * a written instrument incident to such * * * separation * * *" (I. R. C. § 22(k)).

4. In declining to recognize that uniform application of the Internal Revenue Code compels that the payments made by the petitioner to his wife be includible in the gross income of his wife under I. R. C. § 22(k) and therefore deductible from his gross income under I. R. C. § 23(u).

ARGUMENT

POINT I

Under the Law of New York the Petitioner is "Legally Separated" from his Wife by Virtue of the Agreement of November 9, 1926, which Constitutes the Highest Degree of Judicial Recognition Obtainable in that State of the Status of Legal Separation in View of the Subsistence of a Valid Separation Agreement.

Under the law of the State of New York where the separation agreement of November 9, 1926 was executed and where the parties resided and were domiciled (R. 13), the said agreement is valid and constitutes a legal separation of the parties.

Winter v. *Winter,* 191 N. Y. 462, 84 N. E. 382 (1908);

Cogswell v. *Cogswell,* 130 Misc. 541, 224 N. Y. Supp. 59 (1927);

Leary v. *Leary,* 136 Misc. 13, 242 N. Y. Supp. 65 (1928);

Crowell v. *Crowell,* 135 Misc. 530, 238 N. Y. Supp. 44 (1929), aff'd 229 App. Div. 771, 242 N. Y. Supp. 811 (1st Dept. 1930).

Moreover, under the law of the State of New York, once the parties are separated pursuant to a valid subsisting separation agreement, neither party can obtain a judicial decree of separation, since the separation agreement constitutes a complete defense to an action for separation.

New York Civil Practice Act, §§1161-1165;

Johnson v. *Johnson,* 206 N. Y. 561, 100 N. E. 408 (1912);

Stoddard v. *Stoddard,* 227 N. Y. 13, 124 N. E. 91 (1919);

Powers v. *Powers,* 33 App. Div. 126, 53 N. Y. Supp. 346 (1st Dept. 1898);

Benesch v. *Benesch,* 182 App. Div. 221, 169 N. Y. Supp. 561 (1st Dept. 1918);

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Polakoff v. *Polakoff,* 175 Misc. 354, 23 N. Y. Supp. (2d) 259 (1940);

Weimar v. *Weimar,* 25 N. Y. Supp. (2d) 343 (1940);

Carmody's New York Practice, Vol. 9, § 238 and authorities cited therein.

The rationale for the rule in New York that a judicial decree of separation cannot be obtained if there is a valid subsisting separation agreement between the parties is that

by the very terms of the separation agreement the statutory grounds for separation are eliminated, namely, (1) cruel and inhuman treatment of the plaintiff by the defendant, (2) such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former, (3) abandonment of the plaintiff by the defendant, (4) neglect or refusal of the husband to provide for the wife when she is the plaintiff and (5) adultery by the defendant. New York Civil Practice Act, § 1161.

In the case of *Powers* v. *Powers, supra,* the Appellate Division, First Department, stated (53 N. Y. Supp. 346):

> "This action is brought to procure a decree of separation on the ground of abandonment. It appears that, shortly after the separation of the parties, they entered into a formal agreement whereby the parties mutually agreed to live separate and apart. By this agreement a trustee for the plaintiff was appointed, and the defendant agreed to pay to such trustee a certain sum of money per month for the support of plaintiff and the child of the parties, and the custody of such child was given to the plaintiff. It is difficult to see how this action can be maintained, under these circumstances. Where the wife consents to the separation, there is no abandonment. It is only where the husband deserts the wife without her consent, and refuses to give her adequate and proper support, that an action for abandonment will lie. In the case at bar the parties have agreed to live apart, and consequently the separation is with the consent of the plaintiff, and apparently is in accordance with her wishes. There can be no abandonment, under such circumstances. If it is true that the defendant is living in adultery with another person, the plaintiff has a cause of

> action for divorce; but abandonment cannot be predicated thereon, in view of the separation agreement."

In the case of *Drane* v. *Drane, supra,* where the husband brought an action for divorce against his wife, the court granted a motion by the husband to strike out a counterclaim interposed by the wife demanding a judicial separation upon the grounds of cruel and inhuman treatment. The court held that the defendant was barred from interposing a counterclaim for separation because the parties had entered into a separation agreement prior to the commencement of the action. In so doing, the Appellate Division, First Department, stated (201 N. Y. Supp. 756-757):

> "It has often been decided that, where parties have an explicit contract subsisting at the time of the commencement of the action, valid in its inception and being duly performed by the plaintiff, there is no legal justification for an action for separation."
>
> * * *
>
> "That a valid agreement of separation bars an action or a counterclaim for this relief, while the agreement is subsisting and being performed, is the ruling in many cases, of which the following are examples: Powers v. Powers, 33 App. Div. 126, 53 N. Y. Supp. 346; Benesch v. Benesch, 182 App. Div. 221, 169 N. Y. Supp. 561; Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062; Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408, Ann. Cas. 1914B, 407; Stoddard v. Stoddard, 227 N. Y. 13, 20, 124 N. E. 91."

In the case of *Oatman* v. *Oatman, supra,* the Appellate Division, Fourth Department, ordered that a complaint be dismissed in an action for separation where a separation

agreement had been pleaded as a defense (46 N. Y. Supp. (2d) 269):

> "The separation agreement, pleaded as a defense, bars the maintenance of this action. Winter v. Winter, 191 N. Y. 462, 473-475, 84 N. E. 382, 386, 387, 16 L. R. A., N. S., 710; Matter of Rhinelander's Estate, 290 N. Y. 31, 37, 47 N. E. 2d 681, 684; Benesch v. Benesch, 182 App. Div. 221, 169 N. Y. S. 561; Drane v. Drane, 207 App. Div. 217, 201 N. Y. S. 756; Almonte v. Almonte, 259 App. Div. 311, 19 N. Y. S. 2d 153; Matter of Tierney's Estate, 148 Misc. 378, 383, 266 N. Y. S. 51, 58, 59."

In the case of *Polakoff* v. *Polakoff, supra,* the court dismissed the complaint in an action for separation where the defendant asserted as a defense the existence of a separation agreement between the parties (23 N. Y. Supp. (2d) 259, 260):

> "It is well-settled that while a separation agreement subsists, neither party can have recourse to an action for separation. See 9 Carmody's New York Practice, Section 238 and the authorities cited therein."
>
> * * *
>
> "Under all the circumstances, therefore, I conclude that inasmuch as there is a subsisting separation agreement between the parties, plaintiff cannot secure a judicial separation."

In order to determine whether the petitioner was "legally separated" from his wife within the meaning of Section 22(k) of the Internal Revenue Code, we submit that it is of the utmost importance to bear in mind that under the New York law the separation agreement of

November 9, 1926 constituted the highest degree of judicial recognition obtainable in New York of the status of legal separation between the parties in view of the subsistence of a valid separation agreement. Since the petitioner, bound by the separation agreement with his wife, could not obtain a judicial decree of separation, it appears that he had achieved the maximum degree of compliance with the requirement of Section 22(k) of the Internal Revenue Code for legal separation under the law of New York. Cf. *Smith* v. *Commissioner*, 168 F. (2d) 446, 447, 448 (C. C. A. 2d, 1948), where Judge Clark, although characterizing the New York law which precludes a judicial decree of separation where a separation agreement subsists as an "oversimplification of the New York judicial determination to enforce an interparty agreement as the parties have formed it", nevertheless recognizes the New York rule of substantive law as we have discussed it above. The case of *Daine* v. *Commissioner*, 168 F. (2d) 449 (C. C. A. 2d 1948), decided simultaneously with the *Smith* case, is distinguishable from the instant case on the grounds (1) we are not concerned in the instant case with the problem presented in the *Daine* case, namely, whether a separation decree entered *nunc pro tunc* as of the date of the separation agreement would render payments made by a husband to his wife, pursuant to the agreement but prior to the actual date of the decree, deductible under Section 23(u) of the Internal Revenue Code, and (2) the payments made by the husband to his wife in the *Daine* case, unlike those in the instant case, were in effect voluntary payments inasmuch as the husband failed to exercise the option which he had under the separation agreement to terminate the agreement on one month's notice.

In recent cases before the Tax Court, the emphasis in construing Section 22(k) of the Internal Revenue Code has been upon whether the payments in question had been made by a husband to a wife from whom he is *legally separated.* For example, in *Frank J. Kalchthaler,* 7 T. C. 625 (1946), the court refused to allow as a deduction the husband's payments to his wife under a judgment and order which she had obtained, requiring him to pay a weekly sum for her support and separate maintenance. The support order was not a decree of legal separation with separate maintenance. The court emphasized, however, that the husband was not entitled to deduct the payments under Section 23(u) for the reason that the parties were not "legally separated". In this connection, the court stated (p. 625):

> "At no time has there been any written contract or agreement for support or maintenance between husband and wife, and the parties are still married, no divorce having been obtained."

The court commented upon the legislative history and purpose of Section 22(k), emphasizing itself the importance of "legally separated spouses" in the following manner (p. 627):

> "Section 22(k) is a new provision which has been added to section 22 (relating to gross income) under which a new class of income must be included in the gross income of a wife, or a husband as the case may be. The new subsection (k) was added to section 22 'in order to provide *in certain cases* a new income tax treatment for payments in the nature of or in lieu of alimony *or an allowance for support as between divorced or legally separated spouses.'*

(Italics added.) Ways and Means Committee Rept. No. 2333, p. 71; Senate Finance Committee Rept. No. 1631, p. 83; 77th Cong., 2d sess. With respect to the husband, from whom the wife receives payments, complementary provision is made for the deduction from his income of any amount included in such wife's income under section 22(k), by the addition of a new subsection, (u), to section 23 (relating to deductions from gross income). Thus, in some instances, payments received from a husband by a wife must be included in her income and the husband is entitled to a deduction therefor." (All emphasis added by the court).

The court further commented upon the importance to be attached to the fact that the parties are "legally separated" in order that the husband may invoke the provisions of Section 22(k) (p. 628):

"Section 22(k) is limited in its application to payments made to 'a wife who is divorced *or legally separated from her husband* under a decree of divorce or of separate maintenance.' (Italics added.) The obvious plan of the section, as shown by the entire section, is to deal with payments which are made incident to divorce or legal separation. If the meaning of section 22(k) is not clear, in the provision which reads 'a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance,' it is of assistance to refer to the discussion of the term 'separate maintenance' in Words and Phrases, vol. 38, p. 629, wherein it is pointed out that 'in many jurisdictions courts have authority to make an allowance to a wife who is living separate and apart from her husband, *without being legally separated* or divorced, and this allowance * * * is often called "separate mainte-

nance".' (Italics added.) Dyer v. Dyer, 194 S. E. 278.

The construction which must be placed upon section 22(k) with respect to the question presented here is that it relates to periodic payments made under a decree of separate maintenance to a wife who is legally separated or divorced from her husband, but that it does *not* apply to a decree of separate maintenance made to a wife, who is not legally separated or divorced." (All emphasis added by the court).

It is abundantly clear, we submit, that the payments in question in the instant case were made by the petitioner to his wife at a time when they were "legally separated" under the laws of the State of New York and that while a valid separation agreement subsisted no judicial separation decree could have been obtained by either of the parties.

POINT II

The Payments Made by the Petitioner to His Wife From Whom He Was "Legally Separated" Were Made "* * * In Discharge of * * * a Legal Obligation Which, Because of the Marital or Family Relationship, Is Imposed Upon or Incurred by Such Husband Under * * * a Written Instrument Incident to Such * * * Separation * * *" (I. R. C. § 22(k)).

The payments made by the petitioner to his wife during the years 1942 and 1943 were made pursuant to and in discharge of the legal obligation imposed upon or incurred by the petitioner under the written separation agreement of November 9, 1926, which agreement was a written instrument incident to the petitioner's legal separation from

his wife. We concede that the petitioner was not divorced or separated from his wife under a decree of divorce or of separate maintenance within the conventional meaning of such decrees. We submit, however, that under the provisions of Section 22(k) of the Internal Revenue Code it is sufficient that the payments made by the petitioner to his wife were made pursuant to "a written instrument incident to such * * * separation" and it is significant that this statute does not expressly require the payments to have been made pursuant to "a written instrument incident to such * * * separation *decree*". We believe that we are supported in this contention by the decision of the Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Murray,* 174 F. (2d) 816 (C. C. A. 2d, 1949), where Judge Learned Hand, in an opinion concurred in by Judge Swan and Judge Augustus N. Hand, stated, referring to the language of Section 22(k) of the Internal Revenue Code (p. 817):

> "As a new question we are not prepared to say that the phrase, 'a written instrument incident to such divorce or separation,' should be read as 'incident to such divorce or separation decree' ".

This statement in an opinion joined in by the three senior judges of the Court of Appeals for the Second Circuit on May 20, 1949 must be regarded as significant in overruling in effect the previous holding by the same court on June 2, 1948 in the case of *Smith* v. *Commissioner,* 168 F. (2d) 446 (C. C. A. 2d, 1948), where Judge Clark stated in an opinion concurred in by Judge Learned Hand and Judge Swan (p. 447):

> "Examining the single sentence quoted in footnote 1, we find that there are three distinct and

> unclouded references to the requirement of some sort of judicial sanction for an alteration in the marital status in order that the payments be included in the wife's gross income. Thus it is provided that the wife must be 'divorced or legally separated from her husband *under a decree of divorce or of separate maintenance.*' So, too, the payments must have been 'received subsequent *to such decree.*' And finally, they must discharge an obligation 'under a written instrument *incident to such divorce or separation.*' (Emphasis added throughout.) Clearly, the use of 'such' in the last quoted phrase has reference to the prior language, namely, a separation resulting 'under a decree * * * of separate maintenance.' It would be difficult, it seems, to find language more definite."

We submit that the last two sentences quoted above from the opinion in the *Smith* case have been overruled, in effect, by the later decision of the same court in the *Murray* case.

Moreover, in the *Murray* case the Court of Appeals for the Second Circuit, in commenting upon the character of the obligation imposed upon a husband to pay alimony to his wife under a New York separation agreement, stated (pp. 817-818):

> "In New York spouses who have already separated may by agreement fix the alimony which the husband must pay in discharge of his marital obligations, and, the contract will be conclusive upon them, and invulnerable except to those attacks to which any contract is vulnerable. Nevertheless, it is only a contract, and as such it is enforceable only by those sanctions which are available to the promisees in all contracts. *On the other hand, if its terms are incorporated in a matrimonial decree, they may be enforced by the much more drastic*

*sanctions which such decrees carry, and they become 'legal obligations * * * under such a decree'—that is a decree in 'a decree of divorce or of separate maintenance.'* " (Italics added.)

The foregoing comment by the Court of Appeals for the Second Circuit on the change in character of obligation imposed on a husband to pay alimony under a separation agreement when that obligation is incorporated in a matrimonial decree and hence made subject to enforcement by the more drastic sanctions which such decrees carry, is peculiarly appropriate to the facts of the instant case. Here, although the petitioner's obligation to make alimony payments to his wife stemmed essentially from the separation agreement of November 9, 1926, the payments in question nevertheless in fact were made pursuant to and because of the order of June 24, 1941 of the Supreme Court of the State of New York and the judgment of March 29, 1941, as affirmed by the Appellate Division, First Department (R. 33).

While we recognize that there are certain reported decisions in which the courts have ruled against the deductibility of payments made by a husband to his wife in factual situations which approach closely the line of the instant case, we submit that there is no decision squarely against the petitioner's contention herein upon the combination of facts presented by this record and characterized by the Tax Court below as "novel" (R. 82).

The case of *Smith* v. *Commissioner,* 168 F. (2d) 446 (C. C. A. 2d, 1948), presents a factual situation most nearly parallel to the instant case. The payments made by the husband in the *Smith* case, however, were not made pursuant to and because of an order and judgment of a court

of competent jurisdiction as in the instant case. Moreover, the construction by the court in the *Smith* case of the language of Section 22(k) of the Internal Revenue Code is of doubtful weight as authority in view of the later decision by the same court in *Commissioner* v. *Murray,* 174 F. (2d) 816, 817 (C. C. A. 2d, 1949), discussed above at pages 25-27 of this brief.

We likewise have discussed and distinguished the case of *Daine* v. *Commissioner,* 168 F. (2d) 449 (C. C. A. 2d, 1948), above at page 21 of this brief.

On February 27, 1948 in the case of *Harold W. Hoyt* v. *Commissioner,* 7 T. C. M. 104, the Tax Court held that payments made by a husband to his wife were not deductible under Section 23(u), the payments having been made pursuant to a separation agreement entered into by the parties in 1926, which had been attached by the wife to her complaint in an action brought in 1939 for separate maintenance. The action thereafter was discontinued by stipulation of the parties. The court rejected the taxpayer's contention that the separation agreement was incident to the separate maintenance action, and therefore payments made pursuant to that agreement were deductible under Section 23(u). The court stated that since the separate maintenance action had been discontinued, the taxpayer had failed to meet the requirement that alimony payments must be made pursuant to a judicially recognized separation. In the instant case, on the contrary, the wife's action to obtain relief equivalent to separate maintenance was not discontinued, but was pressed to a conclusion; an order and judgment was entered in the Supreme Court of the State of New York directing the husband to make the payments which he now seeks to deduct under Section 23(u) (R. 60-63, 77-79).

The Tax Court, in the *Hoyt* case, appears to have held also that a New York separation agreement is not equivalent to a separation decree, and that even if a separation decree had been rendered, subsequent to the agreement by the parties and made retroactive to the date of the agreement, the agreement nevertheless would not be incident to the decree within the meaning of the statute, citing the case of *Robert L. Daine,* 9 T. C. 47 (1947), later affirmed in *Daine* v. *Commissioner,* 168 F. (2d) 449 (C. C. A. 2nd, 1948). We are not confronted in the instant case, of course, with the problem presented in the *Daine* case, referred to above at page 21 of this brief. Nor do we contend in the instant case that the separation agreement itself was equivalent to a separation decree. It is our position, however, that the order and judgment of the Supreme Court of the State of New York, entered in the action brought by the petitioner's wife, were in effect decrees providing for separate maintenance, and that the payments made by the petitioner pursuant to those decrees in the tax years involved should be deductible under Section 23(u).

The Tax Court held on March 19, 1948 in *Bernarr MacFadden* v. *Commissioner,* 7 T. C. M. 147, that alimony payments made in 1942 and 1943, pursuant to a separation agreement entered into by the parties in 1932, were not deductible under Section 23(u), despite the fact that prior to the tax years involved and subsequent to the date of the separation agreement, a decree for specific performance of the agreement had been entered in the New Jersey state court and under New Jersey law, according to the contention of the petitioner, the payments might be considered to have been made pursuant to a legal separation. The instant case is distinguishable from the *McFadden* case

on the ground that the payments made by the petitioner during the tax years involved were not made directly pursuant to the separation agreement of 1926 (the payments were in amounts $4,000 per year less than provided for in the separation agreement), but on the contrary the payments were made directly pursuant to and because of the order and judgment entered in the Supreme Court of the State of New York and unanimously affirmed by the Appellate Division, First Department.

We of course are not concerned here with the situation presented in the case of *Charles L. Brown,* 7 T. C. 715 (1946), where the claim for deductibility of payments made by a husband to his wife was based exclusively upon the existence of a separation agreement, the payments not having been made pursuant to any judgment or decree whatsoever. Nor are we concerned in the instant case with any possibility of tax evasion as suggested by the footnote reference in the *Brown* case to Gornick, Alimony and the Income Tax (1943), 29 Cornell L. Q. 28, 40. In the instant case, far from the remotest suggestion of income tax evasion, we have a situation where the petitioner and his wife have been living separately and apart for more than 20 years (R. 35-36), and where the payments made by the petitioner to his wife during the tax years involved were made pursuant to an order and judgment entered after litigation of the most bitter and adversary character, as best demonstrated by Exhibits 3 and 4 (R. 77-79). Clearly, if the petitioner's contention here is sustained, and the payments by him to his wife are held deductible from the petitioner's gross income, they certainly will and should be held includible in the gross income of the petitioner's wife, under Section 22(k).

We submit therefore, that upon the novel combination of facts presented by the instant case, referred to by the Tax

Court below (R. 82), where the petitioner is legally separated from his wife pursuant to the law of the State of New York which does not allow a judicial decree of separation in view of the subsistence of a valid separation agreement and where the alimony payments made by the petitioner to his wife were pursuant to and because of an order and judgment of a competent court, such payments should be held includible in the gross income of the petitioner's wife under Section 22(k) of the Internal Revenue Code and therefore deductible from the gross income of the petitioner under Section 23(u) of the Internal Revenue Code. Furthermore, this result is sanctioned by the language of Section 22(k) of the Internal Revenue Code which requires that the payments made by the petitioner to his wife should be in discharge of a legal obligation incurred by him under a written instrument incident to a legal separation and not necessarily incident to a judicial decree of separation.

POINT III

Uniform Application of the Internal Revenue Code Compels that the Payments Made by the Petitioner to His Wife Be Includible in the Gross Income of His Wife Under I. R. C. § 22(k) and Therefore Deductible from His Gross Income Under I. R. C. § 23(u).

Congress is presumed to have intended that Sections 22(k) and 23(u) of the Internal Revenue Code would be applied uniformly throughout the United States in accordance with the Constitution of the United States, Article I, Section 8, Clause 1.

Contrary to the conclusion reached by Judge Clark in the last paragraph of his opinion in *Smith* v. *Commissioner*,

168 F. (2d) 446, 448 (C. C. A. 2d, 1948), we contend that failure to give recognition to the peculiar rule in New York that a judicial decree of separation cannot be obtained in that State if there is a valid, subsisting separation agreement, results in a non-uniform application of the Internal Revenue Code in this respect.

In the last analysis, the petitioner's claim for a deduction in the instant case rests essentially upon the peculiar character of the obligation under the laws of the State of New York pursuant to which he made the payments to his wife during the tax years 1942 and 1943. It is clear beyond a peradventure of a doubt, that the petitioner was legally separated from his wife under the laws of the State of New York during the tax years involved (Cases cited at pages 16-17, *supra*). It also is perfectly true that the petitioner was not divorced or separated from his wife under a decree of divorce, or of separate maintenance, within the conventional meaning of such decrees. The fact of the matter is, however, that the payments made by the petitioner to his wife during the tax years involved were made while he was as completely legally separated from his wife as the laws of the State of New York will permit under such circumstances (Authorities cited at page 17, *supra*), and moreover the payments were made pursuant to and because of an order and judgment obtained in an action brought against him by his wife, which was equivalent to a suit for separate maintenance.

After all, here we have a taxpayer who has been living separately and apart from his wife for more than 20 years (R. 35-36), including a period of years long before Section 22(k) was written into the Internal Revenue Code. His marital obligations were defined in the agreement of Novem-

ber 9, 1926, by the terms of which he could not possibly obtain a separation decree from his wife, since under New York law an action for separation cannot be maintained while a valid separation agreement subsists (Authorities cited at page 17, *supra*). For perfectly obvious reasons, the petitioner's wife insisted on standing upon her rights under the agreement, and refused to seek, or to permit the petitioner to seek, a separation decree. Under these circumstances, when the petitioner made the payments to his wife during the tax years 1942 and 1943, he was separated from his wife, had been judicially recognized as so separated by the courts of New York and no higher degree of judicial recognition could possibly have been given to his status of separation, in view of the valid separation agreement which subsisted.

Under these circumstances, we submit, in the interest of the uniform application of Sections 22 (k) and 23 (u) of the Internal Revenue Code, the petitioner's claim for deduction of the payments made by him to his wife during the years 1942 and 1943 should be sustained. Any other holding would result in a discrimination against the petitioner which certainly was not intended by Congress when it enacted Sections 22 (k) and 23 (u) of the Internal Revenue Code.

We fully agree with Judge Clark's observation in the *Smith* case that "There is no reason, for example, why a separation agreement should have one effect, taxwise, in New York and another in Connecticut." But, we submit, the decision in the *Smith* case results in precisely the lack of uniformity in the administration of the Federal revenue laws it declares against, for in New York a husband separated from his wife under a valid separation agreement

cannot obtain a judicial decree of separation, whereas his neighbor in Connecticut can obtain a decree of divorce or separate maintenance embodying the provisions of his separation agreement and thereby obtain a deduction under Section 23 (u) of the Internal Revenue Code which is denied to the New York husband under the decision in the *Smith* case.

CONCLUSION

The petitioner was "legally separated" from his wife under the laws of the State of New York at the time he made the payments to her during the tax years 1942 and 1943. The status of legal separation between the petitioner and his wife had been accorded the highest degree of judicial recognition obtainable under the laws of New York in view of the subsistence of a valid separation agreement. The payments were made pursuant to and because of a judgment and decree entered in the Supreme Court of the State of New York, and unanimously affirmed by the Appellate Division, First Department. The payments therefore were made by the petitioner to his wife while she was legally separated from him, and the payments were made in discharge of a legal obligation which, because of the marital or family relationship, was imposed upon the husband under the said decree, which itself gave the highest degree of recognition to the legal separation of the parties which could be obtained under the circumstances. Accordingly, the petitioner is entitled to a deduction under Section 23 (u) of the Internal Revenue Code, on the ground that the pay-

ments were includible in the gross income of his wife under Section 22(k) of the Internal Revenue Code.

Dated: Stamford, Connecticut, July 5, 1950.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 174

ALFRED TERRELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 80-83) is a memorandum opinion and therefore not officially reported. The opinion of the Court of Appeals (R. 101-107) is reported in 179 F. 2d 838.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1950. (R. 108.) On May 2,

1950, Mr. Justice Minton extended the time for filing a petition for a writ of certiorari to July 5, 1950. (Pet. 5.) The petition for a writ of certiorari was filed on July 3, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

The taxpayer entered into a separation agreement with his wife but did not obtain a decree of divorce or of separate maintenance; after he failed to make payments under the agreement his wife obtained judgments based upon the agreement. The question presented is whether he was entitled to deduct from his gross income the payments made to his wife pursuant to the judgments, under the provisions of Section 23(u) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved will be found in the Appendix, *infra*, pp. 10-13.

STATEMENT

The facts, some of which were stipulated (R. 49-63), were found as stipulated (R. 80), and as set forth in the Tax Court's opinion (R. 80-81) are substantially as follows:

The taxpayer resides in Chicago, Illinois. (R. 80.) On November 9, 1926, the taxpayer, then residing in New York City, entered into a separation agreement with his wife, Ethel K. Terrell, then residing in Pleasantville, Westchester County, New

York. Pursuant to this agreement the taxpayer was to pay his wife certain sums for her alimony and for the support and maintenance of herself and their two minor sons. (R. 80.)

The agreement, *inter alia,* stated (R. 81):

> SEVENTEENTH: If the party of the first part fails to keep and observe any of the covenants hereby undertaken by him, the party of the second part may, upon any such default, at her election rescind and cancel this agreement by giving written notice to that effect to the party of the first part and thereupon and thereafter bring such actions and suits, at law or in equity, for damages or for legal separation and separate maintenance, or both, as the party of the second part hereunder may see fit, * * *

Subsequently, the taxpayer defaulted in making payments under the November 9, 1926, agreement, and thereafter his wife instituted actions against him in the Supreme Court, New York County, for the State of New York, for (1) payments due for the years 1927, and 1930 through 1936, and (2) for the year 1937. (R. 81.)

In one of these actions, instituted to enforce the agreement of separate maintenance, an order was entered on May 16, 1939, directing the taxpayer to pay to his wife the sum of $500 per month. This order was pursuant to a judgment against the taxpayer entered in the Office of the Clerk of the County of New York on January 12, 1939, in the sum of $8,035.23, in favor of his wife. (R. 81.)

In the other action, an order was entered on June 24, 1941, directing the taxpayer to pay to his wife the sum of $1,000 per month. This order was entered pursuant to a similar judgment of March 29, 1941, in the sum of $15,974.20, which was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, as reported in 263 App. Div. 948. (R. 81.)

The taxpayer paid to his wife or to her attorneys for her account $12,000 during 1942 and $12,000 during 1943. These payments were made pursuant to, and because of, the order of June 24, 1941, and the judgment of March 29, 1941, as affirmed by the Appellate Division. (R. 81.)

The taxpayer sought to deduct the amounts paid to his wife under Section 23(u) of the Internal Revenue Code, but the Commissioner disallowed the deduction. (R. 10, 11.) The Tax Court decided that the payments were not deductible under Section 23(u) because there was no decree of separation in this case. (R. 83.) The taxpayer appealed to the court below which affirmed the decision of the Tax Court. (R. 101-107.)

ARGUMENT

1. The decision of the court below is correct and there is no basis for further review. Section 23(u) of the Internal Revenue Code (Appendix, *infra*, p. 11) provides in part that a husband may deduct from his gross income amounts includible in

the gross income of his wife under Section 22(k). Section 22(k) of the Internal Revenue Code (Appendix, infra, pp. 10-11) is expressly limited to the case of a wife who is divorced or legally separated from her husband *under a decree of divorce or of separate maintenance.* Therefore, unless there has been a decree of divorce or separate maintenance the husband is deprived of the right to a deduction under Section 23(u). This has been the consistent view of the Courts of Appeals, the Tax Court, and the Commissioner. *Smith* v. *Commissioner,* 168 F. 2d 446, 447 (C.A. 2); *Daine* v. *Commissioner,* 168 F. 2d 449, 450 (C.A. 2); *Wick* v. *Commissioner,* 7 T.C. 723, affirmed *per curiam,* 161 F. 2d 732 (C.A. 3); *Commissioner* v. *Walsh,* C.A. D.C., decided April 24, 1950 (1950 C.C. H, par. 9277); Treasury Regulations 111, Section 29.22 (k)-1 (Appendix, *infra,* pp. 12-13); 5 Mertens, Law of Federal Income Taxation (1950 Supp.), Section 31A.02, p. 312; Gornick, *Alimony and the Income Tax,* (1943) 29 Cornell L. Q. 28, 40; Rudick, *Marriage, Divorce and Taxes,* (1947) 2 Tax L. Rev. 123, 144.

There having been no decree of divorce or of separate maintenance in this case, the taxpayer may not obtain a deduction, under Section 23(u), on account of the payments to his estranged wife during the taxable years. The fact that the payments were made pursuant to a judgment of the Supreme Court of New York County (R. 78-79) is immaterial because that judgment was based upon a volun-

tary separation agreement and there had been no decree of divorce or of separate maintenance. See *Wick* v. *Commissioner, supra; Daine* v. *Commissioner, supra;* Treasury Regulations 111, Section 29.22(k)-1. Cf. *Commissioner* v. *Murray,* 174 F. 2d 816 (C.A. 2); *Van Vlaanderen* v. *Commissioner,* 175 F. 2d 389 (C.A. 3); *Mahana* v. *United States,* 88 F. Supp. 285 (C.Cls.), certiorari denied, 339 U. S. 978.

The taxpayer maintains that the decision of the court below results in lack of uniformity because in New York a husband separated from his wife under a separation agreement cannot obtain a decree of separation. (Pet. 7.) But there would seem to be considerable doubt that in New York a husband separated from his wife under a separation agreement is barred from obtaining a decree of divorce. In the *Daine* and *Murray* cases, *supra,* and in *Levy* v. *Commissioner,* decided May 12, 1948 (1948 P-H T.C. Memorandum Decisions, par. 48,077), petition for review dismissed January 6, 1949 (C.A. 2), it appeared that a decree of divorce had been granted in New York despite the existence of a separation agreement. Moreover, the spouses in this case anticipated a decree of separate maintenance because the separation agreement expressly provided that if the taxpayer failed to observe the contract, his wife could bring a suit for legal separation and separate maintenance, or both. (R. 59, 81.) *Supra,* p. 3. See also *Kloek* v. *Kloek,* 54 N.Y.S.

2d 543. But even if it were true that in New York a separation agreement precluded the right to obtain a decree of separate maintenance, there would be no lack of uniformity in denying the husband a deduction unless there had been a decree. As the Second Circuit explained in *Smith* v. *Commissioner,* 168 F. 2d 446, 448-449, the real lack of uniformity would arise if a separation agreement would have one effect, taxwise, in New York and another effect elsewhere. Compare *Commissioner* v. *Tower,* 327 U. S. 280, 287-288.

The taxpayer incorrectly contends that the decision of the court below is in conflict with that of the Second Circuit in *Commissioner* v. *Murray,* 174 F. 2d 816, and also that the decision in the *Murray* case in effect overruled *Smith* v. *Commissioner,* 168 F. 2d 446, previously decided by the same court. (Pet. 9-10, 25-26.) In the *Murray* case, a decree of divorce had been granted prior to the taxable year, while in *Smith,* as here, there had been no decree of divorce or of separate maintenance prior to the payments to the wife; and "it is not disputed that there must be a decree of divorce or a decree of separation before this section of the statute [Section 22(k)] has any application." *Commissioner* v. *Walsh,* C.A. D.C., *supra.* For that reason, the Second Circuit had no occasion to pass upon or overrule the *Smith* case when it decided *Murray,* and the two opinions are plainly consistent. The language in the *Murray* opinion to which the petitioner adverts (Pet. 10,

25) deals with the wholly separate problem whether the phrase "written instrument incident to such divorce or separation" in Section 22(k) (*infra*, p. 10) refers to any instrument incident to the fact that there had been a divorce or judicial separation, or only to one incident to the divorce or separation *decree*. In either case, a divorce or judicial separation would be a necessary prerequisite and neither exists here. See the Government's Brief in Opposition in *Mahana* v. *United States*, Oct. Term, 1949, No. 745, pp. 8-10, for a discussion of this different issue.

2. At the hearing before the Tax Court, the Commissioner made an alternative argument to the effect that if the payments made by the taxpayer pursuant to the judgment of the New York court based upon the separation agreement should be held to be payments in discharge of a legal obligation imposed upon him under a decree of divorce or of separate maintenance, such payments are not "periodic payments" but are "installment payments" within the meaning of Section 22(k). The Tax Court found it unnecessary to pass upon this question, because it decided that the absence of a decree of divorce or of separate maintenance precluded the deduction of the amounts paid by the taxpayer under Section 23(u). The point was reserved in the Commissioner's brief filed in the court below, which also found it unnecessary to pass upon the question. If this Court should grant the writ and then decide

that the decree based upon the separation agreement was equivalent to a decree of divorce or of separate maintenance within the meaning of the statute, the Commissioner will respectfully request that the case be remanded to the Tax Court with instructions to pass upon his alternative argument.

CONCLUSION

The decision of the court below is correct, there is no conflict of decisions and no basis for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1950.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such

installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171 (b).)

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.22(k)-1. *Alimony and Separate Maintenance payments—Income to Former Wife.—(a) In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).
>
> In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:
>
> (1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or
>
> (2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.
>
> The obligation of the husband must be imposed upon him or assumed by him

(or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1) W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

* * * * *

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